



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

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February 7, 2007

John S. Hahn, Esq.
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006

Re: Oahu Sugar Company on Waipio Peninsula portion of Pearl Harbor
Naval Complex Superfund Site

Dear Mr. Hahn:

EPA has reviewed responses by Kaanapali Land, LLC to EPA's CERCLA Section 104(e) requests. These include Kaanapali Land, LLC's August 20, 2005 response to EPA's first Request for Information; March 6, 2006 response to EPA's second request for information, and September 29, 2006 response to EPA's third request for information. Based on EPA's review of these documents combined with its own investigation of the corporate history of Oahu Sugar, Ltd., it is EPA's position that Kaanapali Land, LLC is a potentially responsible party under CERCLA. The basis for EPA's position is that Kaanapali Land, LLC appears to be the corporate successor to the operator, Oahu Sugar Company, Ltd., at the Oahu Sugar Company site on the Waipio Peninsula ("Site").

Throughout its responses to EPA's CERCLA Section 104(e) requests, Kaanapali Land, LLC has maintained that it has not assumed, or succeeded to, the liabilities of Oahu Sugar Company, LLC or its predecessor, Oahu Sugar Company, Ltd., and that this entity is currently in bankruptcy. However EPA's own independent investigation of the corporate history of Oahu Sugar Co., Ltd., supplemented by documents provided to it as part of Kaanapali Land, LLC's responses to EPA's CERCLA Section 104(e) requests, indicate that Kaanapali Land, LLC is in fact a corporate successor to the first-formed of two companies known as Oahu Sugar Company, Ltd., and that this liability has not been affected by any bankruptcy proceedings.

EPA's review of Hawaii Secretary of State documents revealed that a company named Oahu Sugar Company, Ltd. was incorporated on January 6, 1961. See Attachment 1. This is the company that is the predecessor to Oahu Sugar Company, LLC. However, other historical records indicate that an earlier company named Oahu Sugar, Ltd. was incorporated on

February 13, 1897. See KLL01503. Both companies occupied and operated businesses at the Site, though at different times. The original Oahu Sugar Company, Ltd. underwent a name change on January 5, 1961 to Second Sugar Corporation. See KLL01172-KLL01173; KLL001426.¹ The renamed company, Second Sugar Corporation merged into American Factors Ltd. on or about January 6, 1961. See KLL 01333-KLL01393; KLL01265; KLL00878; KLL00881-KLL00941; KLL00961; KLL01098-KLL01159. On or about the same date, a new Oahu Sugar Company, Ltd. was incorporated and became a subsidiary of American Factors Ltd. as a result of the merger. See KLL01296-KLL01318; KLL01160-KLL01171; KLL01201-KLL01205. This entity merged with Oahu Sugar Company, LLC. See Kaanapali Land, LLC response to EPA June 23, 2005 CERCLA Section 104(e) request at 11-12 (August 20, 2005). On April 19, 2005, Oahu Sugar Company LLC filed for Chapter 7 bankruptcy. Thus, the current bankruptcy proceedings deal with the successor of the second Oahu Sugar Company, Ltd., i.e., the one incorporated on January 6, 1961.

As to the original Oahu Sugar Company LLC, as noted above, American Factors Ltd. succeeded to its liabilities as a result of its merger, described above, with Second Sugar Corporation. American Factors Ltd. was renamed Amfac, Inc. in 1966. See Attachment 2. On November 18, 1988 approximately 95 percent of the shares of Amfac, Inc. were sold to Wisconsin and Southern Leasing Co., a subsidiary of Northbrook Corporation. See Kaanapali Land, LLC Response to EPA June 23, 2005 Information Request, Response #1 (Aug. 20, 2005). On April 21, 1995, Wisconsin and Southern Leasing Co. was merged into Northbrook Corporation. See KLL00822-KLL00827. On May 1, 1995, Amfac, Inc. merged into Northbrook Corporation. See KLL00704-KLL00713. On February 27, 2002, a number of companies, including some of the subsidiaries of Amfac Hawaii LLC and Northbrook Corporation, filed for Chapter 11 bankruptcy, KLL00084, but Northbrook itself has not gone through bankruptcy. Among the companies filing for bankruptcy was FHT Corporation, a subsidiary of Northbrook Corporation. KLL00084; KLL00274-KLL00275. As part of the bankruptcy reorganization plan, Northbrook Corporation merged into its subsidiary, FHT Corporation. See KLL00596-KLL00605; KLL00235; KLL00288-KLL00289. On November 14, 2002, FHT Corporation was merged into Kaanapali Land, LLC, another subsidiary of the former Northbrook Corporation as part of the Chapter 11 bankruptcy reorganization. See KLL00548-KLL00557; KLL00084-KLL00234; KLL00288-KLL00289. The 2002 Chapter 11 reorganization plan disclosure statement expressly indicated, however, that: "Following consummation of the Plan and the Mergers, Kaanapali Land will succeed to the Liabilities of Northbrook as well as the liabilities of FHTC which are left unimpaired by the Plan." KLL00316-KLL00317.

The Site was leased from the Navy by the original Oahu Sugar Company, Ltd from at least 1947 to 1961. The Site was used for pesticide and fertilizer mixing during at least part of this period. See KLL01503-KLL01504. Contamination from the pesticide and fertilizer mixing activities found at the Site was released to the soil and groundwater by the original Oahu Sugar Company, Ltd.'s operations at the Site. Attachment 3. Therefore, the original Oahu Sugar Company, Ltd. is liable as an operator under CERCLA. It is well settled that when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the

¹ The numbers beginning with KLL refer to documents provided to EPA by Kaanapali Land, LLC which were Bates stamped with this identifier by Kaanapali Land, LLC.

surviving corporation. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029, 109 S.Ct. 837 (1989). Courts have held that Congress intended to impose successor liability on corporations which have merged with or have consolidated with a corporation that is a responsible party under CERCLA. *See id.* at 92; *see also Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262-63 (9th Cir. 1990).

As a result of a series of mergers over the past 45 years, Kaanapali Land, LLC appears to be the successor to the original Oahu Sugar Company, Ltd., a responsible party under CERCLA. Therefore, Kaanapali Land, LLC has acquired the CERCLA liability of the original Oahu Sugar Company, Ltd.

Based on the foregoing, EPA believes that it is authorized by CERCLA to amend the existing Unilateral Administrative Order against Oahu Sugar Company, LLC to include Kaanapali Land, LLC as an additional respondent jointly and severally responsible for the performance of response actions at the Site. Before taking that step, however, we invite Kaanapali Land, LLC to engage in negotiations toward an agreement for the reimbursement of EPA's response costs and the performance of response actions at the Site. If this approach is of interest to the company, please contact me as soon as possible.

Please contact me if you have any questions.

Larry Bradfish



Assistant Regional Counsel

cc G. Hull, Kaanapali Land, LLC
W. McFarlane, Navy

Enclosures